

**Response under 37 C.F.R. §1.116**  
**Expedited Procedure-Examining Group/Art Unit 3744**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant(s): Gerner

Examiner: Norman, M. E.

Serial No.: 10/774,784

Group/Art Unit: 3744

Filed: February 9, 2004

Docket: 298-220

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**REQUEST FOR WITHDRAWAL OF FINALITY OF OFFICE ACTION**

Pursuant to M.P.E.P. §§ 706.07(a), 706.07(c) and 706.07(d), it is respectfully requested finality of the Office Action mailed May 10, 2006 by the Patent and Trademark Office in the above-identified application be withdrawn for the following reasons.

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**CERTIFICATE OF FACSIMILE**

I hereby certify that this paper is being facsimile transmitted to the Patent and Trademark Office (1-571-273-8300) on the date shown below.

Dated: June 14, 2006

  
George M. Kaplan

Claims 3, 8, 11 and 23 has been indicated allowable in the previous Final Office Action mailed November 16, 2005 by the Patent and Trademark Office. Accordingly, Claims 3 and 8 were amended into independent form in the Amendment filed April 20, 2006 with the Patent and Trademark Office. The remaining claims were all amended to depend either directly or indirectly from one of these two independent claims.

The present Office Action mailed May 10, 2006 cites a new reference which is applied against several of these claims, including independent Claim 3. This reference was uncovered by the Examiner, i.e., not cited in an Information Disclosure Statement filed by Applicant. Concerning this particular situation, M.P.E.P. §706.07(a) reads, in pertinent part, as follows:

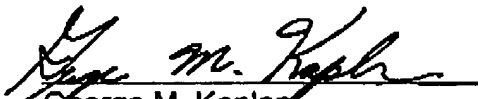
Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement during the period. . . [emphasis added]

In the present instance, Claims 3, 8, 11 and 23 had been indicated allowable in the previous Final Office Action mailed November 16, 2005; in other words, Claim 3 had been previously-pending and simply amended into independent form by the Amendment filed April 20, 2006. Accordingly, the new ground of rejection was not necessitated by Applicant's Amendment, i.e., a change in claimed subject matter, because the recitation found in Claim 3 was previously-pending and, in fact, considered allowable by the Examiner at that time.

Furthermore, the new reference presently applied against the claims was uncovered by the Examiner, as noted at the top of page 2 of the present Office Action. While the previous Office Action mailed November 16, 2005 by the Patent and Trademark Office had indeed been made final (as noted by the Examiner at the top of page 2 of the present Office Action), nevertheless that Final Office Action stated Claim 3 (in addition to Claims 8, 11 and 23) was considered allowable. There is no requirement in M.P.E.P. §706.07(a) *supra* that Office Actions issued subsequent to a Final Office Action must also be made final; rather, there is the explicit requirement such second or subsequent Office Actions should not be made final under specific circumstances as in the present instance.

Accordingly, it is respectfully requested finality of the Office Action mailed May 10, 2006 by the Patent and Trademark Office in the above-identified application be withdrawn.

Respectfully submitted,

  
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